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No. 91-1355

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1991

J. ARON & COMPANY,

Petitioner,

-against-

LEO HAVILAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER J. ARON & COMPANY'S PETITION FOR A WRIT OF CERTIORARI

JAY GOLDBERG
250 Park Avenue
New York, New York 10177
(212) 983-6000

JUDD BURSTEIN
950 Third Avenue
New York, New York 10022
(212) 826-1200

Attorneys for Respondent

QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA") requires an employee of a New York Stock Exchange ("NYSE") member to arbitrate claims, having nothing to do with business conducted on the NYSE, against a non-NYSE member?

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INTRODUCTION

Respondent Leo Haviland ("Haviland") submits this brief in opposition to petitioner J. Aron's ("Aron") request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 16, 1991, affirming the District Court's denial of Aron's motion to compel arbitration of Haviland's claims against it.

STATEMENT OF THE CASE

The sole issue in this case is whether Haviland, only by virtue of the fortuitous fact that he worked for NYSE member Goldman, Sachs & Co. (Goldman"), must arbitrate his claim with non-NYSE member Aron. Aron argues that arbitration is required here even though Aron's and Haviland's dispute is not even tangentially related to the NYSE, Goldman's status as a member of NYSE, or Haviland's status as a NYSE registered representative. In essence, Aron believes that its status as Goldman's coconspirator entitles it to the benefits of arbitration.

Notwithstanding Aron's attempts to transform this case into one of "considerable importance to the securities industry" (Petitioner's petition at 3), there is nothing so extraordinary about this case to justify this Court's review. The Second Circuit's ruling stands for the unremarkable proposition that an employee of a NYSE member should be required to arbitrate only those claims against non-NYSE members which implicate the concerns of the NYSE.

Significantly, *since 1984*, the rule in the Second Circuit has been that employees of NYSE members must, pursuant to NYSE Rule 600(a), arbitrate only those claims against non-NYSE members which are "controversies arising out of ... exchange-related business." *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank, N.A.*, 728 F.2d 577, 580 (2d Cir. 1984). In all of that time, NYSE never amended Rule 600(a) so as to excise this "exchange-related business" requirement. The obvious reason for this omission is that the *Paine, Webber* rule is eminently sensible. For example, if an NYSE member employee trips and falls on the premises of a non-NYSE member, should he be required to arbitrate any negligence claim he might have? Obviously, the answer to this question must be "no."

This being so, it becomes clear that Aron's true complaint here is not with the existence of the Second Circuit's "exchange-related business" rule, but rather with its *application* in this case. We respectfully submit that this Court should not concern itself with the narrow question of whether the facts of Haviland's case justified the application of the "exchange-related business" rule so as to excuse Haviland from having to arbitrate his dispute.

STATEMENT OF THE FACTS

A. THE NATURE OF HAVILAND'S ALLEGATIONS

As explained in the complaint, Haviland joined Goldman in 1979. In 1982, Haviland created and became head of the Energy Futures and Options Group ("Energy Futures"), a part of the Futures Services Department of Goldman's Fixed Income Division. On or about April 26, 1984, Goldman made Haviland a vice president. From 1984 until the termination of his employment in January or February of 1989, throughout the schemes to extort and defraud him, Haviland functioned as the Goldman vice president in charge of Energy Futures. In this capacity, Haviland traded in energy futures as well as options on energy futures ("futures options") on behalf of large refining and marketing firms, energy producers, and oil trading companies.

In this capacity, and throughout his entire tenure at Goldman, Haviland was not involved in *any* NYSE-related activities. His affidavit, submitted in opposition to the defendants' motion in the District Court, makes this clear:

> Although I am a NYSE registered representative, I never acted in that capacity while employed by Goldman. To the best of my recollection, I never executed any trades on

that Exchange. Indeed, I can recall no occasion during my tenure at Goldman on which I acted in my capacity as a NYSE registered representative.

Rather, my work involved trading on various commodity exchanges, including the International Petroleum Exchange in London. In order to trade on these exchanges, one does not have to be a NYSE registered representative.

During the times relevant to this litigation, I was employed by the Energy Futures and Options Group ("Energy Futures"), a part of the Futures Services Department of Goldman's Fixed Income Division. In order to work for Energy Futures, one did not have to be a NYSE registered representative. Indeed, some of the individuals who worked for Energy Futures were not NYSE registered representatives.

Similarly, Goldman's status as a NYSE member was and is wholly irrelevant to the work of Energy Futures. All of our business could have been completed even if Goldman had not been a NYSE member. In fact, there are many companies which conduct the same business that Energy Futures conducts, but which are not NYSE members.

(A: 50-51)[1]

Thereafter, in response to a sworn, false submission by Goldman and Aron partner David Ford, Haviland submitted a further affidavit that made it even more clear that the New York Stock Exchange has nothing to do with this case:

> [N]otwithstanding defendants' claims to the contrary, there simply is no established, much less enforced, policy requiring Energy Futures employees to take ... the NYSE Registered Representatives Exam....

(A: 95-96)

Haviland's non-NYSE related efforts at Goldman led him to be entrusted with extensive, exclusive, and confidential knowledge about the needs, plans, and strategies of important players in the energy market, who were his and Goldman's customers. As a result, Goldman earned huge profits from both commissions on trades executed by Haviland and Energy Futures, as well as interest on monies deposited by Haviland's customers with Goldman so that they could trade on margin.

In addition to Haviland's efforts, Goldman increased its level of participation in the energy market by its 1984 decision to have Aron, a partnership consisting of all Goldman partners, act as a principal in the energy futures, options, forwards and physical delivery markets. Pursuant to this decision, Aron would purchase and/or sell futures,

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[1] Numbers preceded by the letter "A:" refer to pages of the Joint Appendix submitted to the Court of Appeals. Numbers preceded solely by the letter "A" refer to pages of the appendix to Aron's petition.

options, forwards, and actual commodities for itself, and then hope to trade them at a profit. It would also act as a market maker. Given the nature of Aron's business, access to Haviland's confidential information about the trading, purchase, and sale plans of his significant clients would be of tremendous value to Aron. For example, if Aron had advance knowledge that one of Haviland's customers planned to purchase a substantial amount of oil at $20 a barrel, Aron could make an effort to corner the market at that $20 price, and then have the oil available for sale at perhaps $20.25 a barrel when Haviland's customer sought to make its purchase.

The monies involved in the energy futures and futures options markets are tremendous, and even minute fluctuations in price can result in immense profits or losses. Given the high stakes, Goldman's decision to use Aron in the energy markets created great concern on the part of Haviland and his clients at Energy Futures. In addition, Haviland expressed grave doubts about his ability to maintain what had previously been a sterling reputation for honesty and confidentiality in the energy business. Confidentiality and anonymity were unequivocal conditions of Haviland's relationships with his clients, and crucial to his efforts to attract new clients.

Recognizing these concerns, Goldman made explicit, but false, promises to Haviland and, through Haviland and through direct misrepresentations, to Haviland's customers, that there would be no exchange of confidential customer information between Energy Futures and Aron. The sum and substance of each of the specific misrepresentations was that a "Chinese Wall" either would or did exist between Aron and Energy Futures, *i.e.*, that all Energy Futures' customers' confidences would be zealously kept from others, particularly Aron. Goldman made these misrepresentations knowing that they were false and intending to defraud Haviland into remaining at Goldman under the false belief that he would be permitted and encouraged to continue to act ethically. This

scheme to defraud Haviland commenced in April of 1984, and continued into at least the Spring of 1987. As detailed in the complaint, there were numerous mailings and wire communications made in furtherance of this fraud.

Relying upon these misrepresentations, Haviland passed up significant opportunities for employment at firms which would have ultimately paid him more money and have allowed him to conduct his business without pressures to divulge confidential information. Instead, over the ensuing years, Haviland found himself pressured to reveal confidential information, denied appropriate compensation, and then fired.

In addition, from July of 1987 through January of 1989, defendants made repeated attempts to extort Haviland into divulging confidential information to Aron. Each of these attempts was rebuffed by Haviland. Thereafter, Goldman made good on its threats. Notwithstanding the fact that Haviland had steadily increased profits at Energy Futures, he was denied appropriate salary increases in 1987 and 1988, and then, on or about February 1, 1989, summarily dismissed in violation of Goldman's own published termination policies.

Hence, although Aron claims otherwise, *this case is not a claim for wrongful termination*. Nor does it ultimately have anything to do with Haviland's performance as a Goldman employee. Rather, this case involves wholly improper and illegal efforts by Goldman and Aron to extort and defraud Haviland. Much as Aron would like to transform this case into a referendum on Haviland's performance at Goldman, it cannot succeed. Put simply, Goldman could have had a host of legitimate, independent reasons -- which it did not have -- for firing Haviland. Nonetheless, if Haviland's allegations are proven, Aron will be held liable for violating the RICO statute. No action by Haviland could serve to cure or excuse Aron's wrongdoing.

B. THE NATURE OF ARON'S ARBITRATION CLAIM

In seeking arbitration, Aron, a non-member of NYSE, relies upon NYSE Rule 600(a):

> Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

In essence, Aron argues that Haviland's claim against Aron must be arbitrated because Aron's dispute is with a person (Haviland) who, by virtue of his status as a NYSE registered representative, is an "associated person" affiliated with NYSE member Goldman.

While we concede that, because he is a NYSE registered representative, Haviland is an "associated person" as that term is defined by Rule 600(a), we will demonstrate in this brief that, as the District Court and Second Circuit correctly found, Rule 600(a) is nonetheless inapplicable here.

C. THE DISTRICT COURT'S RULING

In rejecting Aron's arbitration claim, the District Court relied upon the governing case of *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank, N.A., supra*, where the Second Circuit held that Rule 600(a) does not apply to a non-NYSE member accused of wrongdoing unless there are "controversies arising out of ... exchange-related business," 728 F.2d at 580. Relying upon this explicit holding in *Paine, Webber*, the District Court stated:

> The predicate RICO acts and common law fraud alleged involve Haviland's activities trading energy commodities on exchanges other than the NYSE, and Aron concedes that Haviland could perform the same activities without registering with the NYSE. Despite the federal policy favoring arbitration, to require arbitration of these claims would extend the parties' arbitration agreement beyond any reasonable understanding of their intentions. We find that Haviland's claims here do not relate to any exchange-related business.

Haviland v. Goldman, Sachs & Co., 736 F. Supp. 507, 510 (S.D.N.Y. 1990), *aff'd*, 947 F.2d 601 (2d Cir. 1991) (A34).

D. THE RULING OF THE COURT OF APPEALS

On Aron's appeal, a divided panel of the Second Circuit affirmed the District Court. The majority agreed with Haviland that he should be required to arbitrate only those disputes which he agreed to arbitrate. *Haviland v. Goldman, Sachs & Co.*, 947 F.2d 601, 604 (2nd Cir. 1991) (A9). It then turned to the scope of Rule 600(a), and reaffirmed its prior

ruling in *Paine, Webber* that, in cases where a non-NYSE member is accused of misconduct, a NYSE member employee must arbitrate only those "'controversies arising out of the member's exchange-related business.'" 947 F.2d at 605 (A11) The Court so ruled because, recognizing that arbitration is a creature of contract, "[t]his construction of Rule 600(a), in our view, faithfully reflects the expectations of those who would be bound by it." *Id.*

Having reaffirmed its *Paine, Webber* ruling, the majority then turned to the allegations in this case, finding that Haviland's lack of connection to any NYSE-related activity rendered Rule 600(a) unenforceable with respect to his claims against Aron. Aron's petition to this Court followed.

SUMMARY OF ARGUMENT

1. The Second Circuit's ruling in no way undermines the strong Federal policy favoring arbitration. Beyond the fact that the Second Circuit explicitly considered this policy in its opinion, all courts agree that this policy does not authorize forcing someone to arbitrate disputes which he has not agreed to arbitrate.

2. The Courts of Appeals are not divided on the issue raised by this petition. To the contrary, with just one exception, all of the cases offered by Aron in support of its "split in the Circuits" claim discuss only NYSE Rule 347, and do not discuss Rule 600(a). As for the one case which does focus on Rule 600(a), the District of Columbia Circuit agrees that Rule 600(a) contains an "exchange-related business" requirement. The difference in results between this case and the District of Columbia Circuit are solely the result of differences in the relevant facts.

3. The issue presented here is not of enough significance to warrant review by this Court in light of the fact that the supposed industry-wide concerns raised by the Second Circuit's decision can be resolved through NYSE's amendment of its own Rule 600(a).

ARGUMENT

POINT I

THE SECOND CIRCUIT'S DECISION IN NO WAY UNDERMINES THE FEDERAL POLICY FAVORING ARBITRATION

Far to the contrary of Aron's claim that the Second Circuit's ruling runs counter the policies underlying the FAA, the truth is that its decision in this case was wholly consistent with that policy.

The majority opinion in this case correctly stated and applied the governing principles regarding arbitration. *See* 947 F.2d at 604-05 (A8-A10). In particular, the Court of Appeals noted this Court's observation in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986), "that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" 947 F.2d at 604 (A8). Plainly, if, as we contend, the Second Circuit correctly concluded that Haviland's Form U-4 agreement did not contemplate arbitration of disputes with non-NYSE members which did not relate to NYSE business, then its decision in this case is wholly consistent with the FAA. As this Court noted in *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989), the purpose of the FAA is "'to make arbitration

agreements as enforceable as other contracts, *but not more so.*'" (Citations omitted) (emphasis supplied).

With these general principles in mind, we turn to the issue of whether the Second Circuit correctly interpreted Rule 600(a). It did. In ruling that Haviland's dispute with Aron did not have to be arbitrated, the Second Circuit relied upon its prior decision in *Paine, Webber, Jackson & Curtis v. Chase Manhattan Bank, N.A., supra.* There, the Court had ruled that Chase Manhattan, a non-member of NYSE, could not require, under Rule 600(a), Paine, Webber to arbitrate its claim that a Chase employee had misled Paine, Webber into "extending credit to and in trading government securities" with an individual by the name of Sheridan. 728 F.2d at 579. In holding that Rule 600(a) does not apply to a non-NYSE member accused of wrongdoing unless there are "controversies arising out of ... exchange-related business," 728 F.2d at 580, the Court, focusing on the contractual nature of arbitration agreements, stated:

> The arbitration provisions found in the NYSE Constitution and Rules governing member-non-member controversies should be limited, at least in cases such as the instant one in which the alleged improper conduct is on the part of the non-member, to controversies arising out of the member's exchange-related business.
>
> * * *
>
> Whatever may be the exact meaning of the term exchange-related business, clearly the credit inquiry and extension of credit involved here is not encompassed therein, *at least in a situation such as this where the securities transactions between Paine Webber and*

Sheridan did not involve the exchange in any way.

728 F.2d at 580-81 (Emphasis supplied).

Beyond reaffirming *Paine, Webber*, the Second Circuit majority in this case also added another rationale for imposing the "exchange-related business" rule. Noting that Rule 600(a) only gives the non-NYSE member, as opposed to the member employee (such as Haviland) the right to demand arbitration, the Court stated that "[i]t seems inconsistent with the reasonable intention of the Exchange insider to extend this unilateral advantage to the nonmember outside the field of exchange-related activities." 947 F.2d at 605 (A11).

Application of this "exchange related business" rule mandated the result reached by the Second Circuit. As discussed above, Haviland never acted as a stock broker for Goldman, and, indeed, never even executed a trade on the New York Stock Exchange while employed there. All of Haviland's trading occurred on other exchanges, including the International Petroleum Exchange in London, England. Put simply, Haviland could have conducted all of his Goldman business even if Goldman had not been a member of NYSE. As in *Paine, Webber*, Haviland's involvement "did not involve the exchange in any way." 728 F.2d at 581. There was thus no basis for compelling arbitration with respect to the claim against Aron.

This being so, the Second Circuit's ruling was in no way inconsistent with the policy underlying the FAA. The facts are clear that Haviland never agreed to arbitrate the dispute at issue here, nor could he have reasonably expected that his signing the Form U-4 would require him to do so.

POINT II

THE COURTS OF APPEAL ARE NOT DIVIDED ON THE "EXCHANGE-RELATED BUSINESS" RULE

In support of its claim that there is a split among the Circuit Courts, Aron cites five cases from other Circuits at pages nine and ten of its petition. *Four of the cases do not even discuss Rule 600(a)*, focusing instead upon the entirely different NYSE Rule 347 (relating to disputes between a NYSE member and its employees). Accordingly, there can be no claim that these cases signify a split among the Circuits.

Indeed, the only case cited by Aron in which Rule 600(a) is even discussed is *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987). Far from signifying a disagreement among the Circuits, *Pearce* supports application of the "exchange-related business" rule. In *Pearce*, the Court, in construing the arbitration provision of the Form U-4, stated:

> We agree that it would probably be unfair -- because beyond the probable contemplation of the parties to the U-4 agreement -- to require an associated person to submit literally *any* dispute arising out of his employment to arbitration, especially claims not deriving in some fashion from the occupational duties as *an associated person*. If an associated person slips and falls in the member firm's premises, his negligence claim against the firm raises no issues that would not also arise if a secretarial or janitorial worker has such a fall; it would be odd, therefore, if the parties intended to require the associated person to submit a dispute over such a mishap to NYSE arbitration, since the

> employer's membership in the NYSE is a fortuity, no more relevant to the slip-and-fall of an employee who is an associated person than to that of another employee. The phrase "arising out of my employment" is therefore more sensibly read as "arising out of my employment *as an associated person.*"

828 F.2d at 832 (Emphasis in original).

This rationale for a restrictive application of Rule 600(a) is plainly applicable here. Haviland's status as a NYSE registered representative is wholly irrelevant, since Haviland could have conducted his business for Goldman without his being a registered representative. Hence, as in the example used by the *Pearce* Court, Goldman's membership in the Exchange is a "fortuity" that is insufficient to warrant invocation of Rule 600(a).

Significantly. the Second Circuit majority opinion directly addressed *Pearce.* Far from expressing a disagreement with *Pearce*, the majority simply, and correctly, distinguished that case on its facts:

> We note also that in *Pearce*, in which the Exchange's interest in the reputation of its members was stressed, *see* 828 F.2d at 830, asserted misconduct by the complaining associated member was central to the dispute between the parties. *See id.* at 827. As we indicated in *Paine*, the Exchange's interest in the business conduct of its members may warrant a broader reading of Rule 600(a) in this context, *see Paine*, 728 F.2d at 580 & n.5, but no misconduct by Haviland has been put in issue here.

947 F.2d at 607 (A14-A15).

Hence, the supposed split in the Circuits is an illusion. There is no extant Court of Appeals decision which is inconsistent with the Second Circuit's majority opinion.

POINT III

THE ISSUE RAISED BY ARON IS NOT WORTHY OF REVIEW BY THIS COURT BECAUSE NYSE CAN AMEND ITS RULES TO REQUIRE ARBITRATION OF DISPUTES WHICH ARE NOT "EXCHANGE RELATED"

In its majority opinion, the Second Circuit noted:

> In addition, we note that associated persons like Haviland contract to arbitrate directly with the Exchange in signing a U-4 registration statement..., and in doing so undertake an open-ended commitment to be bound by the Exchange's rules, constitution, and bylaws. It was thus within the Exchange's power to impose in Rule 600(a) the all-exclusive protection of the Exchange's reputational interests for which Aron contends. In our view, however, it has not done so.

947 F.2d at 607 (A15).

As the majority opinion makes clear, this is a case where NYSE has the unilateral power to explicitly require arbitration of disputes such as the present one. In so doing, NYSE could obviate all of the concerns raised by Aron. We respectfully submit that the matter should therefore be left to NYSE. There is no sound reason to ask this Court to expend

its valuable but constrained resources upon interpretation of a privately enacted rule which can be explicitly "clarified" by NYSE.

CONCLUSION

Aron's petition for a writ of certiorari should be denied.

Respectfully submitted,

JAY GOLDBERG
250 Park Avenue
New York, New York 10177
(212) 983-6000

JUDD BURSTEIN
950 Third Avenue
New York, New York 10022
(212) 826-1200

Attorneys for Respondent